Docket No. 18-01

IN THE

United States Foreign Intelligence Surveillance Court of Review

Washington, D.C.

IN RE: CERTIFICATION OF QUESTIONS OF LAW TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

Upon Certification for Review by the
United States Foreign Intelligence Surveillance Court

MOVANTS' OPENING BRIEF

David A. Schulz
Hannah Bloch-Wehba
John Langford
MEDIA FREEDOM & INFORMATION ACCESS CLINIC
ABRAMS INSTITUTE
Yale Law School
P.O. Box 208215
New Haven, CT 06520
Phone: (203) 436-5827
Fax: (203) 432-3034
david.schulz@ylsclinics.org

Alex Abdo
Jameel Jaffer
KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY
475 Riverside Drive, Suite 302
New York, NY 10115
Phone: (646) 745-8500
alex.abdo@knightcolumbia.org

Patrick Toomey
Brett Max Kaufman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
ptoomey@aclu.org

Arthur B. Spitzer
Scott Michelman
AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA
915 15th Street, N.W., 2nd floor
Washington, D.C. 20005
Phone: (202) 457-0800
Fax: (202) 457-0805
aspitzer@acludc.org

*Counsel for Movants**

* Bar membership information for counsel is provided in the attached Certification of Bar Membership and Security Clearance Status.

CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union and the American Civil Liberties Union of the District of Columbia are non-profit corporations. They have no parent corporations and do not issue stock. The Media Freedom and Information Access Clinic is an organization within Yale University, which is a non-profit corporation and does not issue stock. Movants do not have parent corporations or owners that are under foreign ownership, control, or influence, as defined in Intelligence Community Standard 700-01.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review questions of law certified by the FISC. 50 U.S.C. § 1803(j).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether Movants have Article III standing to assert their claim of a qualified First Amendment right of public access to judicial opinions issued by the Foreign Intelligence Surveillance Court.

PRELIMINARY STATEMENT

The question certified for review presents a single issue: whether a denial of access to the judicial opinions of an Article III court constitutes an injury in fact sufficient to confer standing on the party seeking to inspect those records. Virtually every court to confront a claim of access to judicial records, including the en banc Foreign Intelligence Surveillance Court ("FISC") in this case, has either held or assumed that the denial of access to judicial records is an injury in fact. That is true in national security cases, including in prior FISC cases and in terrorism prosecutions, where much may be classified. And it is true even in cases where courts, including the Supreme Court, having assumed or expressly found standing, ultimately rejected the existence of the claimed right of access on the merits. Overwhelming authority supports the en banc holding below and establishes the standing of the American Civil Liberties Union, the American Civil Liberties

Union of the District of Columbia, and the Media Freedom and Information Access Clinic (collectively, "Movants") to seek disclosure of FISC opinions.

Courts routinely exercise jurisdiction over claims of access to judicial records because, under Article III, the denial of access to such records is unquestionably an actual injury that is cognizable by the courts. This is all that Article III requires. The government and the dissent below arrive at a different conclusion by conflating the question of standing with that of the merits. That is, they conclude that standing is lacking because they would reject Movants' claim on the merits. The Supreme Court and other courts have regularly warned against this error in logic, for the injury required by Article III is distinct from what must be shown to prevail on the merits. Conflating the two, moreover, elevates to jurisdictional significance disputes appropriately resolved only on the merits, including the merits of disputes that courts may come to view differently over time.

The Court should accordingly affirm the judgment of the court below.

STATEMENT OF THE CASE

In August and October 2013, government officials and journalists revealed that intelligence agencies had used the Foreign Intelligence Surveillance Act ("FISA") to justify the bulk collection of Americans' call records, internet

metadata, and location information.[1] The government's reliance on FISA for these purposes came as a surprise to the public. Nothing on the face of the statute purported to grant such broad surveillance authority, and nothing in the legislative history of FISA or the amendments embodied in the PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), suggested that Congress intended to authorize the bulk collection of Americans' information.

The Motion for Access to Court Records

On November 6, 2013, Movants filed the motion at issue here, seeking the release of any FISC opinions addressing "the bulk collection of Americans' information," pursuant to the First Amendment right of access and FISC Rule 62. Movants' Mot. for Release of Court Records at 3, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under FISA* ("*In re Opinions & Orders Addressing Bulk Collection*"), No. Misc. 13-08 (FISC Nov. 7, 2013). Movants filed the motion to inform the public about how the FISC construes the scope of government surveillance authority when ruling on surveillance applications.

In response to Movants' access motion, the government identified four FISC opinions addressing its authority to collect information in bulk. *See* Gov't Opp. at 2, *In re Opinions & Orders Addressing Bulk Collection*, No. Misc. 13-08 (FISC

[1] *See, e.g.*, James R. Clapper, Dir. of Nat'l Intelligence, Cover Letter Announcing Document Release at 3 (Aug. 21, 2013), http://1.usa.gov/1bU8Cgt; Charlie Savage, *In Test Project, N.S.A. Tracked Cellphone Locations*, N.Y. Times, Oct. 2, 2013, http://nyti.ms/18OAlz2.

Dec. 6, 2013). Two construed the extent to which Section 215 of the PATRIOT Act, 50 U.S.C. § 1861, conferred authority for the bulk collection of Americans' call records. Redacted versions of these opinions had been released in September and October 2013, following a government declassification review, after two FISC judges requested publication of the opinions under FISC Rule 62.[2] The other two opinions addressed authority for bulk collection of Americans' internet metadata under FISA's pen-register provision, 50 U.S.C. § 1842. These opinions were released by the government with redactions following a declassification review, after Movants filed their access motion.[3]

The redactions in the opinions are substantial, making it difficult for a reader to understand the FISC's legal analysis. In two of the opinions, dozens of pages are almost entirely redacted. *See* Kollar-Kotelly Opinion at 8–9, 31–38, 73–79; Bates Opinion at 36–52, 57–70. In addition, certain key facts, definitions, and concepts have been redacted, including:

---

[2] Amended Memorandum Opinion, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from* [*Redacted*], No. BR 13-109 (FISC Aug. 29, 2013), https://perma.cc/LF5Z-VCFR ("Eagan Opinion") (released Sept. 17, 2013); Memorandum, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from* [*Redacted*], No. BR 13-158 (FISC Oct. 11, 2013), https://perma.cc/NWZ2-MXZU ("McLaughlin Opinion") (released Oct. 18, 2013).

[3] Opinion and Order, [*Redacted*], No. PR/TT [Redacted] (FISC released Nov. 18, 2013), http://1.usa.gov/19Ct5rl ("Kollar-Kotelly Opinion"); Memorandum Opinion, [*Redacted*], No. PR/TT [Redacted] (FISC released Nov. 18, 2013), http://1.usa.gov/19Ct7Q5 ("Bates Opinion").

1. the types of "metadata" that the FISC reasoned were not protected by the Fourth Amendment and could therefore be collected in bulk;[4]

2. the duration of the bulk collection authorized;[5]

3. the manner in which Americans' bulk internet metadata was used by the government, in addition to "contact chaining";[6] and

4. the nature and duration of the government's non-compliance with the FISC's orders.[7]

The redactions obscure critical information necessary for the public to understand the FISC's reasoning and its holdings. The first category of redactions, for example, make it impossible for the public to understand how the FISC applied the Fourth Amendment to basic kinds of internet data—and therefore what surveillance the FISC found lawful. *See, e.g.*, Kollar-Kotelly Opinion at 7–11;

[4] *See* Kollar-Kotelly Opinion at 7–11, 19 ("[Redacted] like other forms of metadata, is not protected by the Fourth Amendment . . . ."); Bates Opinion at 2, 35, 71 ("The government requests authority to [redacted] categories of [sixteen pages of redacted material].").

[5] *See, e.g.*, Bates Opinion at 4.

[6] *See, e.g.*, Kollar-Kotelly Opinion at 42–43 ("NSA proposes to employ two analytic methods on the body of archived meta data it seeks to collect. . . . The two methods are: (1) *Contact chaining* . . . [(2)] [Redacted].").

[7] *See, e.g.*, Bates Opinion at 2–3 ("[T]he government acknowledges that NSA exceeded the scope of authorized acquisition continuously during the more than [redacted] years of acquisition under these orders."); *id.* at 105 ("[T]he unauthorized collection included: [redacted].").

Bates Opinion at 2.[8] Likewise, the fourth category of redactions conceals the ways in which the government violated the boundaries set by the FISC.

Critically, there is no indication in the public record that the FISC had any role in determining which portions of its own opinions should be made public. The government appears to have determined unilaterally which parts of the FISC's orders should be redacted and kept secret. By contrast, in response to a separate access motion brought by the ACLU, the FISC required the government to explain and justify its proposed withholdings in another FISC opinion.[9] That review proved essential to securing public access to the court's opinion.[10] Once required to defend its withholdings, the government abandoned many of them. Nothing similar occurred here.

The Initial FISC Opinion Denying Standing

On January 25, 2017, the FISC issued an opinion denying Movants' access motion for lack of jurisdiction. The opinion reasoned that "the First Amendment

[8] *See also* Ellen Nakashima & Greg Miller, *Official Releases What Appears To Be Original Court File Authorizing NSA To Conduct Sweeps*, Wash. Post, Nov. 18, 2013, http://www.wapo.st/IGqxNK (because "[t]hree pages [of the Kollar-Kotelly Opinion] describing the categories of 'metadata' . . . were redacted," its "true scope" remains "unclear"); Bates Opinion at 57–71 (describing the FISC's legal analysis distinguishing internet metadata from content as "difficult line-drawing," following fifteen pages of redacted text).

[9] *See In re Orders of this Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02 (FISC Nov. 20, 2013), https://perma.cc/29WY-TUGV.

[10] *In re Orders of this Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02 (FISC Aug. 7, 2014), https://perma.cc/KE97-PZWC.

does not afford a qualified right of access" to the opinions sought by Movants, and therefore "Movants lack standing under Article III" to seek access. *In re Opinions & Orders Addressing Bulk Collection*, No. Misc. 13-08, 2017 WL 427591, at *1 (FISC Jan. 25, 2017).

The opinion's determination that the FISC lacked jurisdiction to consider Movants' requests for access conflicted with previous FISC rulings. *See In re Orders of this Court Interpreting Section 215 of the PATRIOT Act* ("*In re Section 215 Orders*"), No. Misc. 13-02, 2013 WL 5460064 (FISC Sept. 13, 2013) (Saylor, J.); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISC 2007) (Bates, J.); *In re Proceedings Required by 702(i) of FISA Amendments Act of 2008*, No. Misc. 08-01, 2008 WL 9487946 (FISC Aug. 27, 2008) (McLaughlin, J.). After Movants sought to alter or amend the FISC's judgment, Presiding Judge Collyer, pursuant to Rule 49 of the FISC Rules of Procedure, *sua sponte* requested that all FISC judges be polled as to whether the question of Movants' standing should be reconsidered en banc.[11] A majority voted in favor of reconsideration.

The En Banc FISC Opinion Affirming Standing

On November 9, 2017, the FISC issued an en banc opinion holding that Movants have asserted a cognizable injury in fact and therefore have established standing. The en banc court vacated the January 25, 2017 decision and remanded

[11] Order, *In re Opinions & Orders Addressing Bulk Collection*, No. Misc. 13-08 (FISC Mar. 22, 2017).

the case for further proceedings. *In re Opinions & Orders Addressing Bulk Collection*, No. Misc. 13-08, 2017 WL 5983865 (FISC Nov. 9, 2017) ("En Banc Op.").

The FISC explained that, "[f]or purposes of standing, the question simply cannot be whether the Constitution, properly interpreted, extends *protection* to the plaintiff's asserted right or interest." En Banc Op. at *4 (slip op. at 8) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006) (en banc)). That would require reaching the merits of a claim to determine the existence of standing to raise it. Instead, the en banc FISC explained, courts must assume that plaintiffs like Movants possess the asserted right of access, "so long as that right is cognizable"—in other words, so long as "courts are capable of knowing or recognizing such an interest." *Id.* at *4 (slip op. at 8–9). The en banc court found "the sufficiency of Movants' allegation of such a legally protected interest" to be clear, given the Supreme Court's right-of-access decisions and the overwhelming authority among the lower courts that a denial of access to the judicial process, including to judicial opinions, satisfies the legally protected interest prong of the standing analysis. *Id.* at *5 (slip op. at 10); *see id.* at *5–15 (slip op. at 9–14).

Five judges dissented from the FISC's en banc opinion. *In re Opinions & Orders Addressing Bulk Collection*, 2017 WL 5983865, at *9–21 ("Dissenting

Op."). The dissenters did not take issue with the conclusion that the injury asserted by Movants is concrete and particularized, actual or imminent, fairly traceable to the challenged action, and redressable by a favorable ruling. They would have held, however, that Movants failed to allege the invasion of a legally protected interest because, in the view of the dissenters, there is no First Amendment right of access to FISC opinions. Dissenting Op. at *12 (slip op. at 13).

Pursuant to 50 U.S.C. § 1803(j), a majority of FISC judges agreed that the question of whether Movants have asserted a sufficient injury in fact should be certified to this Court.[12] This Court accepted review on January 9, 2018.[13]

SUMMARY OF THE ARGUMENT

The en banc FISC correctly held that a denial of access to the judicial process, including judicial opinions, constitutes an invasion of a judicially cognizable interest sufficient to satisfy Article III's requirement that a party demonstrate injury in fact. Courts presented with claims for access to judicial proceedings or records have held time and again—explicitly or implicitly—that the denial of access itself is a sufficient injury in fact to confer jurisdiction. To

[12] Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, *In re Opinions & Orders Addressing Bulk Collection*, No. Misc. 13-08 (FISC Jan. 5, 2018).

[13] Order, *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. 18-01 (FISCR Jan. 9, 2018).

establish standing, a party need only claim injury to a non-frivolous legal interest, and Movants have plainly done so here.

ARGUMENT

In order to invoke the jurisdiction of any Article III court, including the FISC, a party must demonstrate: (1) that it has suffered an injury in fact; (2) that the injury is caused by or fairly traceable to the challenged actions of the defendant; and (3) that it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Movants have plainly met these requirements here.

Movants requested and were denied access to certain FISC opinions, and the only question in dispute is whether that denial constitutes an "injury in fact." En Banc Op. at *3 (slip op. at 7). The Supreme Court in *Lujan* described "injury in fact" as the "invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural, or hypothetical." 504 U.S. at 560 (citations omitted). Both before and after *Lujan*, the Supreme Court has explained what it means for an interest to be "legally protected" for purposes of the standing inquiry: it means that the injury alleged must be one that is "legally and judicially cognizable," *Raines v. Byrd*, 521 U.S. 811, 819 (1997), assuming the validity of the party's claim on the merits, *see Warth v. Seldin*, 422 U.S. 490, 500 (1975). The en banc court correctly concluded that Movants' claim is legally and

judicially cognizable. *See* En Banc Op. at *4 (slip op. at 8–9). The dissent's contention that Movants failed to demonstrate an "invasion of a legally protected interest," Dissenting Op. at *10 (slip op. at 3), is untenable.

I. MOVANTS HAVE IDENTIFIED AN INJURY IN FACT SUFFICIENT TO ESTABLISH ARTICLE III STANDING.

Denial of access to Article III judicial opinions, including FISC opinions, constitutes an injury sufficient to satisfy Article III. A party who asserts a constitutional right of access to court records, and is denied that access, has suffered an injury that is both concrete and particularized. The injury is concrete because the party seeking access is in fact being deprived of information, and it is particularized because the party specifically sought and was denied certain material. Virtually every court to consider the question has agreed, either explicitly or implicitly, with this basic proposition. Moreover, in finding standing, courts have overwhelmingly agreed that a claimed right of access to judicial records is a legally cognizable interest—whether or not an actual right of access is ultimately established on the merits.

As an initial matter, the Supreme Court's decisions uniformly presume that a party seeking to inspect judicial records or attend court proceedings has standing. In *Press-Enterprise Co. v. Superior Court* ("*Press-Enter. II*"), 478 U.S. 1 (1986), a seminal First Amendment right-of-access case, the Supreme Court squarely considered whether it had "jurisdiction under Article III, § 2, of the Constitution."

Id. at 6. While its discussion focused on the issue of mootness, the Court never questioned that the media company asserting a right of access had suffered an injury in fact. Nor did the Court anywhere suggest that the media company's standing turned on the merits of its access claim. The Supreme Court's earlier right-of-access decisions are also in line with this approach. *See Press-Enter. Co. v. Superior Court* ("*Press-Enter. I*"), 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality). Significantly, the Court has recognized standing to assert a constitutional access right even when it ultimately *denied* the existence of that right. *Gannett Co. v. DePasquale*, 443 U.S. 368, 377–78 (1979) (rejecting a newspaper publisher's Sixth Amendment right-of-access claim on the merits). That the Supreme Court has not doubted movants' standing to assert rights of public access to judicial proceedings is unsurprising: in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), it explicitly recognized that the type of "interest" necessary for a party to pursue a right-of-access claim had long been found "in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government." *Id.* at 597–98 (citations omitted).

Every circuit court of appeals has followed the Supreme Court's lead, holding, either explicitly or implicitly, that a party denied access to judicial records

or proceedings has suffered an injury in fact sufficient to confer Article III standing. *See, e.g.*, *Carlson v. United States*, 837 F.3d 753, 758–61 (7th Cir. 2016); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994); *Doe v. Pub. Citizen*, 749 F.3d 246, 264 (4th Cir. 2014); *In re Wash. Post Co.*, 807 F.2d 383, 388 n.4 (4th Cir. 1986) (finding that newspaper "meets the standing requirement because it has suffered an injury that is likely to be redressed by a favorable decision"); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 788 (9th Cir. 2014) (stating that there is "no question" that news organization had alleged a cognizable injury caused by court's denial of timely access to newly filed complaints); *United States v. Cianfrani*, 573 F.2d 835, 845–46 (3d Cir. 1978) ("Intervenors' allegations that the district court denied them access to the pretrial hearing, and continues to deny them access to the record of that proceeding, state the constitutionally required 'injury in fact[.]'"); *Newman v. Graddick*, 696 F.2d 796, 800 (11th Cir. 1983) ("[T]he newspaper publisher has suffered a 'distinct and palpable' injury since its reporters have requested and been denied access."); *In re Bos. Herald, Inc.*, 321 F.3d 174 (1st Cir. 2003) (rejecting claim of access to eligibility documents for Criminal Justice Act funds on the merits, without questioning movant's standing); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (sustaining claim of access to summary judgment materials filed under seal on the merits, without questioning movant's standing); *United States v. Edwards*, 823

F.2d 111 (5th Cir. 1987) (rejecting certain claims of access to *in camera* juror questioning while sustaining others on the merits, without questioning movant's standing); *In re Search of Fair Fin.*, 692 F.3d 424, 428–29 (6th Cir. 2012) (rejecting claim of access to judicial documents filed in search warrant proceedings on the merits, without questioning movant's standing); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 572–73 (8th Cir. 1988) (sustaining claim of access to documents filed in support of search warrant applications, without questioning movant's standing); *United States v. Gonzales*, 150 F.3d 1246 (10th Cir. 1998) (rejecting claim of access to fee applications filed under the Criminal Justice Act on the merits, without questioning movant's standing); *Dhiab v. Trump*, 852 F.3d 1087 (D.C. Cir. 2017).[14]

A recent decision by the Seventh Circuit is instructive. In *Carlson v. United States*, the court analyzed the standing question at length in response to a suit for access to grand jury transcripts. 837 F.3d at 758–61. It sharply distinguished the existence of standing from the merits of an access claim, emphasizing that "Carlson has standing to assert his claim to the grand-jury transcripts, because they

[14] The dissenting opinion below points to *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009), but even that case recognized that members of the public have standing to seek access to "judicial records," which is precisely what Movants seek here. *Id*. at 1073–74. To the extent that *Bond* suggests that courts may collapse the standing and merits inquiries in right-of-access cases, Movants submit that it is at odds with both the Supreme Court's decisions and those of other circuit courts, as well as the Seventh Circuit's recent decision in *Carlson*.

are public records to which the public may seek access, even if that effort is ultimately unsuccessful (perhaps because of sealing, national security concerns, or other reasons)." *Id.* at 757–58; *see id.* at 759. The Seventh Circuit's logic echoes that of the Third Circuit in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, in which the court held that newspapers had established standing to seek access to a confidential settlement agreement even if they did not ultimately prevail on the merits. Instead, the court held, to establish standing, the newspapers needed only to show that the confidentiality order they challenged "present[ed] an obstacle" to the access they were seeking. *Id.* at 777; *see Pub. Citizen*, 749 F.3d at 264 (holding that intervenors' injury "is formed by their inability to access judicial documents and materials filed in the proceedings below, information that they contend they have a right to obtain and inspect under the law").

Less than a year ago, the D.C. Circuit implicitly affirmed the same principles when it addressed a right-of-access claim on the merits. Though a fractured panel in *Dhiab v. Trump*, 852 F.3d 1087, ultimately rejected a claim for access to videotape evidence of force-feeding at Guantánamo Bay, not one member of the panel questioned intervenors' *standing* to pursue the access claim. Even Judge Williams, who questioned whether the videos were "judicial records," nowhere suggested that the court of appeals lacked jurisdiction to reach the merits. *See id.* at 1103–04 (Williams, J., concurring); *see also In re N.Y. Times Co. Application to*

Unseal Wiretap, 577 F.3d 401, 409–11 (2d Cir. 2009) (rejecting request to unseal wiretap applications and related materials on the merits, without questioning the party's standing).[15]

In line with this consensus, the FISC itself has repeatedly found standing to consider claims of access to its records. *In re Section 215 Orders*, 2013 WL 5460064, at *2–4; *In re Proceedings Required by § 702(i) of FISA Amendments Act of 2008*, 2008 WL 9487946; *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484.

Even outside the domain of judicial records and proceedings, courts have broadly recognized that the denial of access to information or proceedings constitutes an injury to a legally cognizable interest. The Supreme Court has consistently held that a party suffers an Article III injury when he or she seeks and is denied information, regardless of whether the party is ultimately entitled to the information sought. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–

[15] The dissenting opinion suggests that several of the decisions cited in this section are inapposite because "they involved permissive intervenors," who need not necessarily demonstrate standing to intervene. Dissenting Op. at *19 (slip copy at 21). But Movants here are similarly situated to those intervenors, because they seek the disclosure of court records filed or issued in the course of preexisting judicial proceedings. While Movants readily satisfy Article III's standing requirement for the reasons set out in this brief, the dissent's argument would suggest, if anything, that Movants could pursue their access claims without demonstrating Article III standing at all. *See, e.g.*, *King v. Governor of New Jersey*, 767 F.3d 216, 244–46 (3d Cir. 2014) (holding that a permissive intervenor need not have Article III standing).

50 (1989) (reasoning that the fact that a party sought and was denied specific agency records "constitutes a sufficiently distinct injury to provide standing" under the Freedom of Information Act); *see also FEC v. Akins*, 524 U.S. 11, 21–25 (1998) (holding that a group of voters had a concrete injury based upon their inability to receive certain donor and campaign-related information from an organization); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (concluding that deprivation of information about housing availability was sufficient to constitute an Article III injury). Perhaps most tellingly, even when the Supreme Court has *rejected* a claimed right of access on the merits, it has held or assumed that the party deprived of access had standing. *See, e.g.*, *Pub. Citizen*, 491 U.S. at 449–50; *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (rejecting, on the merits, reporters' claim that the First Amendment afforded right of access to prisons or their inmates); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974) (rejecting, on the merits, press's First Amendment challenge to prison regulation prohibiting face-to-face interviews with prisoners).

Likewise, other appellate courts have recognized parties' standing to seek access to non-judicial information or proceedings under the First Amendment. In the context of administrative hearings, the Second Circuit held that a plaintiff denied access to those proceedings had suffered an injury in fact. *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294–95 (2d Cir. 2011). The

court found that the plaintiff had suffered an injury to "a cognizable interest" by being excluded from the hearings. *Id*. at 295. Standing did not depend on whether the plaintiff could show a First Amendment right to attend administrative hearings in general, or on whether the plaintiff ultimately established a right to attend any hearings in particular. *Id.* at 294–96; *see also Flynt v. Rumsfeld*, 355 F.3d 697, 702 (D.C. Cir. 2004) (observing, in case where reporter was denied access to military combat units, "we assume the validity of appellants' allegation of injury, although having crossed that threshold, we may ultimately determine it to be invalid"); *Cal. First Amendment Coal. v. Calderon*, 150 F.3d 976, 980 n.8 (9th Cir. 1998) ("Although we conclude that Procedure 770 does not violate the Coalition's First Amendment rights to gather news, the Coalition asserts an interest that is at least arguably protected by the [F]irst [A]mendment.").

The case law is consistent on the question of Article III standing in right-of-access cases because the Supreme Court has sharply distinguished the "judicially cognizable interest" necessary to support standing from the legal entitlement necessary to prevail on the merits. *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Those invoking a court's jurisdiction need not establish the latter to demonstrate the former. As the Supreme Court has said, "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth*, 422 U.S. at 500; *see also Initiative & Referendum Inst.*, 450 F.3d at 1093; *Arreola v.*

Godinez, 546 F.3d 788, 794–95 (7th Cir. 2008). And as the Seventh Circuit has observed:

> That [the] petition is not guaranteed to be granted, because a court may find a valid justification for denying him access, in no way destroys his standing to seek the documents. To hold otherwise would amount to denying standing to everyone who cannot prevail on the merits, an outcome that fundamentally misunderstands what standing is.

Carlson, 837 F.3d at 759 (citations omitted); *see Initiative & Referendum Inst.*, 450 F.3d at 1092 ("For purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing."); *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 363–64 (D.C. Cir. 2005) (explaining that a "legally protected interest" need only be a "cognizable" one because to require any more would "thwart a major function of standing doctrine—to avoid premature judicial involvement in resolution of issues on the merits").

Accordingly, the standing inquiry does not rest on whether the "Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest." *Initiative & Referendum Inst.*, 450 F.3d at 1092. That is a merits inquiry. Instead, courts should presume the existence and legal validity of a plaintiff's asserted right, so long as that right is cognizable and non-frivolous. *Id.* at

1093. A right is "cognizable" so long as courts are capable of knowing or recognizing the interest asserted. "Where [a] plaintiff presents a nonfrivolous legal challenge, alleging an injury to a protected right such as free speech, the federal courts may not dismiss for lack of standing on the theory that the underlying interest is not legally protected." *Id.* at 1093.[16]

To assume otherwise by collapsing standing and the merits, as the dissent did below, would invite a slew of legal and practical problems. Conflating the two would invite courts to resolve constitutional questions at the threshold—an invitation at odds with the canon of constitutional avoidance. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) (describing the Supreme Court's "policy of avoiding unnecessary adjudication of constitutional issues"). Indeed, the FISC's prior access decision illustrates how constitutional issues may be avoided by correctly distinguishing standing from the merits. *See In re Section*

[16] In addressing *Initiative & Referendum Inst.*, the dissent acknowledged that standing and the merits are distinct questions, but where it proceeded to draw the line between those inquiries is all but unprecedented in First Amendment access cases. *See* Dissenting Op. at *16–18 (slip copy at 16–19). The dissent would treat its analysis of whether FISC opinions "have been historically open to the public" as a standing question. *Id.* at *17 (slip copy at 18). But that has never been the measure of a party's injury in fact, even in the First Amendment cases the dissent cites. Instead, myriad cases explicitly or implicitly recognize standing based on the fact that the party has been injured by being denied access to information—even when those cases ultimately rejected claims on the merits because the category of judicial proceeding or court record fell outside the scope of the First Amendment's protection.

215 Orders, 2013 WL 5460064, at *2–4, *8 (finding standing and ordering declassification review of FISC materials pursuant to Rule 62, without addressing First Amendment claim). And in many cases, courts conflating standing with the merits would have to make premature factual determinations in the absence of an adequate record—an approach ordinarily inappropriate at the outset of a case, where even "a generalized allegation of injury in fact" suffices. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992).

Finally—and critically, as the en banc majority recognized—requiring an established right to confer standing would essentially bar novel legal claims from the courts. If standing required the definitive demonstration of a right's existence and scope, then plaintiffs could never establish the existence of constitutional rights in novel contexts or challenge established precedent. Courts, however, routinely entertain claims asserting the existence of rights not yet recognized or even rights rejected in the past. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (establishing a Fourteenth Amendment right to marriage licensing and recognition for same-sex couples); *Citizens United v. FEC*, 558 U.S. 310, 365 (2010), *overruling Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (establishing a Second Amendment individual right to keep and bear arms, effectively overruling *United States v. Miller*, 307 U.S. 174 (1939)); *Lawrence v. Texas*, 539 U.S. 558 (2003),

overruling Bowers v. Hardwick, 478 U.S. 186 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding for the first time that certain limitations on campaign expenditures violate First Amendment rights to free speech and association); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), *overruling Plessy v. Ferguson*, 163 U.S. 537 (1896). Similarly, even in cases asserting *wholly novel* rights of access, courts have held that standing exists. *See, e.g.*, *Carlson*, 837 F.3d at 757–61; *Flynt*, 355 F.3d 697; *N.Y. Civil Liberties Union*, 684 F.3d at 294–95. "[F]ar-fetchedness is a question to be determined on the merits," not at the standing phase. *Initiative & Referendum Inst.*, 450 F.3d at 1093.

To be sure, determining whether a given interest is judicially cognizable can present a difficult question in some cases. An asserted injury can be so unorthodox or frivolous that it is not "judicially cognizable" or "legally protectable." *See id*. at 1093 ("[A] plaintiff whose claimed legal right is so preposterous as to be legally frivolous may lack standing on the ground that the right is not 'legally protected.'"); *Allen v. Wright*, 468 U.S. 737, 752 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components*, 134 S. Ct. 1377 (2014) (questioning whether an injury may be "too abstract" to be judicially cognizable). But that is not remotely the case here. As shown above, while courts have upheld far more tenuous claims, Movants assert a widely recognized

interest—one routinely embraced by Article III courts as a proper basis for exercising their jurisdiction.

II. NOTHING ABOUT THE FOUR OPINIONS SOUGHT BY MOVANTS ALTERS THE STANDING ANALYSIS.

To address the standing issue, this Court need go no further than recognizing that uniform case law and settled doctrine dictate that Movants have satisfied Article III's injury-in-fact requirement by alleging a denial of access to judicial opinions. The dissenting judges below would have held otherwise, relying on the fact that the specific opinions Movants seek have been partially disclosed, and that the four opinions contain classified information. Neither fact has legal significance for the standing inquiry.

A. Partial disclosure of the opinions at issue does not alter the standing analysis.

That Movants are being denied access to only *portions* of the FISC opinions, *see* Dissenting Op. at *9 (slip op. at 1–2), does not void Movants' standing. In fact, many right-of-access motions challenge only the partial withholding of information. *See, e.g.*, *Pub. Citizen.*, 749 F.3d 246 (partially redacted judicial opinion); *Newsday LLC v. Cty. of Nassau*, 730 F.3d 157, 165–66 (2d Cir. 2013) (partially redacted hearing transcript). If partial disclosure eliminated standing to assert a constitutional right of access, the right of access would mean little, as the government could always disclose some information to insulate its withholdings

from judicial review. In reality, whether the partial disclosures have entirely satisfied Movants' claims is not a question of standing, but rather of mootness. A suit becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). However, as long as a court can still grant "any effectual relief whatever to the prevailing party," a case is not moot. *Id*. at 172 (quoting *Knox v. Serv. Emps*., 567 U.S. 298, 307 (2012)); *see also Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (finding that dismissal on mootness grounds is warranted if the court is unable to grant "any effectual relief whatever").

Here, Movants continue to suffer an injury in fact with respect to the undisclosed portions of the opinions. The FISC can still grant relief to the Movants by granting access to redacted portions of the judicial opinions. The government's partial, voluntary disclosure of a judicial opinion—however extensive—cannot serve to eliminate a party's standing to petition the FISC for disclosure of the remainder of those opinions under the First Amendment. Movants' claim for access is not moot, and their standing is certainly not implicated.

B. The existence of classified information in undisclosed portions of the opinions does not strip Movants of standing to raise their right-of-access claim.

Contrary to the conclusion of the dissenting judges, *see* Dissenting Op. at *9 (slip op. at 2), the fact that the FISC opinions at issue contain information classified by the executive branch has no bearing on Movants' standing to seek the opinions under the First Amendment. The dissent appears to suggest that the government's classification of information in the opinions divests Movants of standing in two ways, but neither has merit.

First, the dissent argues that the threshold question is whether Movants have a right of access to information that the government says is classified, Dissenting Op. at *11 (slip op. at 5), but this misunderstands Movants' claim and the First Amendment right of access. Movants claim a right of access to the FISC's Article III opinions, and it is undisputed that these opinions are judicial records, regardless of whether they contain classified information. They were created by Article III judges exercising judicial authority vested by Article III. *See Nixon*, 435 U.S. at 598 ("Every court has supervisory power over its own records and files."). Movants seek access to these *judicial* opinions arising from Article III proceedings, not to executive branch materials.

This is significant because the right-of-access analysis looks to the "type" of proceeding or record at issue, not (as the dissent would have it) to the specific

information contained within a particular record. *See El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (the experience test looks "to the experience in that *type* or *kind* of hearing"); *Press-Enter. II*, 478 U.S. at 10 (analyzing the experience of access to preliminary hearings as a category); *Lugosch*, 435 F.3d 110 (analyzing whether summary judgment documents, as a category, are subject to the right of access).

Accordingly, when courts have confronted a claim of access to particular judicial documents, they have analyzed the existence of the right of access to the *category* of document at issue. *See Pub. Citizen*, 749 F.3d 246 (judicial opinions and summary judgment papers); *Lugosch*, 435 F.3d 110 (summary judgment papers); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1029–31 (11th Cir. 2005) (court docket sheets); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93–94 (2d Cir. 2004) (court docket sheets); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988) (summary judgment papers); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d at 572–73 (search warrant applications).

If, on the merits, a party succeeds in demonstrating that a right of access attaches to particular types of judicial documents, then a court may proceed to consider whether the right is overcome for specific documents, in whole or in part, by determining whether closure is "essential to preserve higher values"; whether

there are reasonable alternatives; whether closure "is narrowly tailored to serve that interest"; and whether closure will be effective. *Press-Enter. II*, 478 U.S. at 13–14. If Movants, on the merits, succeed in demonstrating that the public has a right of access to the FISC's opinions, only then would the court consider the government's justifications for its proposed redactions. In other words, the nature of the redactions has no bearing on the *existence* of a right of access to the opinions in the first place. Rather, the nature of the redactions is relevant to the determination of whether any right that is found to exist can be overcome.

Applying this reasoning, courts have not hesitated to review claims of access involving classified information, secret court proceedings, or sealed materials, even if they ultimately required only partial disclosures or fully denied the claim. *See In re Wash. Post Co.*, 807 F.2d at 390–92 (classified information); *In re Search of Fair Fin.*, 692 F.3d at 428–29, 433 (sealed search warrants); *In re N.Y. Times Co. Application to Unseal Wiretap*, 577 F.3d at 409–11 (sealed wiretap applications); *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 63–65 (4th Cir. 1989) (sealed search warrants). Even in prior FISC cases that rejected claims concerning the public's right of access to the court's opinions or proceedings, the FISC expressly held that the movants had standing. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 383; *In re Proceedings Required by § 702(i) of FISA Amendments Act of 2008*, 2008 WL 9487946.

Second, the dissent contends that claims involving classified information call for a more demanding standing inquiry, *see* Dissenting Op. at *20–21 (slip op. at 23–25), but that contention relies on a misinterpretation of *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), and *Raines v. Byrd*, 521 U.S. 811 (1997). Those cases do not, as the dissent suggests, impose a heightened standing requirement for claims implicating classified information or executive branch decision-making—and they certainly do not instruct courts to recast merits issues into standing questions. *See Schuchardt v. President of the United States*, 839 F.3d 336, 348 n.8 (3d Cir. 2016) ("Despite *Clapper*'s observation that the standing inquiry is especially rigorous in matters touching on intelligence gathering and foreign affairs," no court has held that "Article III imposes [a] heightened standing requirement for the often difficult cases that involve constitutional claims against the executive involving surveillance." (quoting *Jewel v. NSA*, 673 F.3d 902, 913 (9th Cir. 2011)). Moreover, as the En Banc Opinion correctly points out, Movants here seek access to the results of *judicial* proceedings—they do not challenge executive branch conduct—and thus Movants' claim is not "directly traceable to the activities of the political branches in intelligence gathering or foreign affairs." En Banc Op. at *8 (slip op. at 17). Accordingly, Movants' standing burden is the same as for any party seeking access to the opinions of an Article III court.

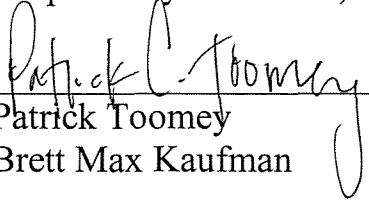
The dissent's reliance on *Clapper* and *Raines* is misplaced for the additional reason that those cases did not turn on the "legally protected" interest prong of the injury-in-fact requirement. Instead, *Clapper* focused on Article III's requirement that the alleged injury in fact be "certainly impending," 568 U.S. at 409; and *Raines* found that the plaintiffs had neither identified a "personal stake" in the matter nor alleged a sufficiently concrete injury, 521 U.S. at 830. Here, in contrast, there is no question that Movants' injuries are actual, concrete, and personal: Movants have in fact been denied access to portions of the opinions they seek. Thus, even if *Clapper* or *Raines* elevated the standing burden for certain cases, that elevated burden would not apply to this one. And in any event, as the En Banc Opinion observed, the Supreme Court has never suggested that any elevated standing burden would "involve jumping to the merits of the dispute." En Banc Op. at *8 (slip op. at 16).

CONCLUSION

For the foregoing reasons, the Court should affirm the FISC's en banc ruling and hold that Movants have Article III standing to seek access to the FISC's judicial opinions.

Dated: February 23, 2018

Respectfully submitted,



David A. Schulz
Hannah Bloch-Wehba

Patrick Toomey
Brett Max Kaufman

John Langford
Media Freedom & Information Access Clinic*
Abrams Institute
Yale Law School
P.O. Box 208215
New Haven, CT 06520
Phone: (203) 436-5827
Fax: (203) 432-3034
david.schulz@ylsclinics.org

Alex Abdo
Jameel Jaffer
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
Phone: (646) 745-8500
alex.abdo@knightcolumbia.org

American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
ptoomey@aclu.org

Arthur B. Spitzer
Scott Michelman
American Civil Liberties Union of the District of Columbia
915 15th Street, N.W., 2nd floor
Washington, D.C. 20005
Phone: (202) 457-0800
Fax: (202) 457-0805
aspitzer@acludc.org

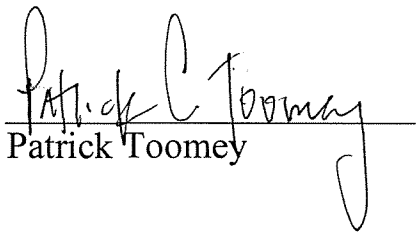
Counsel for Movants

* This memorandum has been prepared with the assistance of Yale Law School students, Meenakshi Krishnan and Paulina Perlin. This brief does not purport to present the institutional views of Yale Law School, if any.

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation set out in the Order of the Foreign Intelligence Surveillance Court of Review dated January 9, 2018, because it is no more than 30 pages in length excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.



Patrick Toomey

CERTIFICATION OF BAR MEMBERSHIP AND SECURITY CLEARANCE STATUS

Pursuant to the United States Foreign Intelligence Surveillance Court of Review's Rules of Procedure 9(d), 9(e) and 19, Movants respectfully submit the following information:

Bar Membership Information

Undersigned counsel for Movants are licensed attorneys and members, in good standing, of the bars of United States district and circuit courts. *See* FISCR R.P. 9(d), 19.

Patrick Toomey is a member, in good standing, of the following federal courts: the United States Courts of Appeals for the Second, Fourth, and Ninth Circuits; and the United States District Courts for the Eastern and Southern Districts of New York, and the District of Colorado. He is licensed to practice law by the bars of the States of Massachusetts and New York.

Brett Max Kaufman is a member, in good standing, of the following federal courts: the Supreme Court of the United States; the United States Court of Appeals for the Second Circuit, Third Circuit, and Federal Circuit; and the United States District Courts for the Southern District of New York and the District of Columbia. He is licensed to practice law by the bar of the State of New York.

Alex Abdo is a member, in good standing, of the following federal courts: the Supreme Court of the United States; the United States Courts of Appeals for the First, Second, Fourth, Ninth, and District of Columbia Circuits; and the United States District Courts for the Eastern and Southern Districts of New York. He is licensed to practice law by the bar of the State of New York.

Jameel Jaffer is a member, in good standing, of the following federal courts: the Supreme Court of the United States; the United States Courts of Appeals for the Second, Fourth, Sixth, Ninth, and District of Columbia Circuits; and the United States District Courts for the Eastern and Southern Districts of New York, the Eastern District of Michigan, and the District of Columbia. He is licensed to practice law by the bar of the State of New York.

Arthur Spitzer is a member, in good standing, of the following federal courts: the Supreme Court of the United States; the United States Courts of Appeals for the Fourth, Ninth, District of Columbia, Federal, and Armed Forces Circuits; and the United States District Courts for the Eastern and Southern Districts of New York, and the District of Columbia. He is licensed to practice law by the bar of the District of Columbia.

Scott Michelman is a member, in good standing, of the following federal courts: the Supreme Court of the United States; the United States Courts of Appeals for the Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and District

of Columbia Circuits; and the United States District Courts for the Northern District of California (inactive status), the District of Columbia, and the Eastern and Western Districts of Michigan. He is licensed to practice law by the bar of the District of Columbia and is an inactive member of the bar of the State of California.

David Schulz is a member, in good standing, of the following federal courts: the Supreme Court of the United States; the United States Courts of Appeals for the Second, Third, Fourth, Ninth, Tenth and District of Columbia Circuits; and the United States District Courts for the District of Columbia, the District of Connecticut, and for all Districts of the State of New York. He is licensed to practice law by the bars of the District of Columbia and the State of New York.

Hannah Bloch-Wehba is a member, in good standing, of the following federal courts: the United States Courts of Appeals for the Ninth and Eleventh Circuits; and the United States District Court for the District of Columbia. She is licensed to practice law by the bars of the State of Texas and the District of Columbia.

John Langford is a member, in good standing, of the following federal courts: the United States Courts of Appeals for the Second and Ninth Circuits; and the United States District Courts for the Eastern and Southern Districts of New York. He is licensed to practice law by the bar of the State of New York.

Security Clearance Information

Pursuant to FISCR R.P. 9(e), Movants certify that Arthur Spitzer held a "Secret" security clearance issued in 2011 by the Department of Justice. Although this clearance technically expired in 2016, Mr. Spitzer has applied to renew that security clearance and he understands that he continues to be permitted access to classified information while his application is pending.

The point of contact for Mr. Spitzer's security clearance is:

Debra M. Guerrero-Randall
Security Specialist
U.S. Department of Justice
SEPS - Litigation Security Group
2CON 2W.115
Washington, DC 20530
Phone: (202) 514-9016
Fax: (202) 307-2066

Because Movants' motion and the related briefing does not contain classified information, Movants respectfully submit that all undersigned counsel may participate in proceedings on the motion without access to classified information or security clearances. *See* FISCR R.P. 19 (requiring counsel to have only "the appropriate security clearance").

Dated: February 23, 2018

Respectfully submitted,

Patrick Toomey
Brett Max Kaufman
American Civil Liberties Union

David A. Schulz
Hannah Bloch-Wehba
John Langford

Media Freedom & Information Access Clinic
Abrams Institute
Yale Law School
P.O. Box 208215
New Haven, CT 06520
Phone: (203) 436-5827
Fax: (203) 432-3034
david.schulz@ylsclinics.org

Alex Abdo
Jameel Jaffer
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
Phone: (646) 745-8500
alex.abdo@knightcolumbia.org

Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
ptoomey@aclu.org

Arthur B. Spitzer
Scott Michelman
American Civil Liberties Union of the District of Columbia
915 15th Street, N.W., 2nd floor
Washington, D.C. 20005
Phone: (202) 457-0800
Fax: (202) 457-0805
aspitzer@acludc.org

Counsel for Movants

CERTIFICATE OF SERVICE

I, Patrick Toomey, certify that on this day, February, 23, 2018, a copy of the foregoing brief was served on the following persons by the methods indicated:

By email and UPS delivery

Maura L. Peterson
Litigation Security Group
U.S. Department of Justice
2 Constitution Square
145 N Street, N.E.
Suite 2W-115
Washington, DC 20530
Maura.L.Peterson@usdoj.gov

By email and UPS delivery

Jeffrey Smith
Counsel, Appellate Unit
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, DC 20530
Jeffrey.Smith5@usdoj.gov

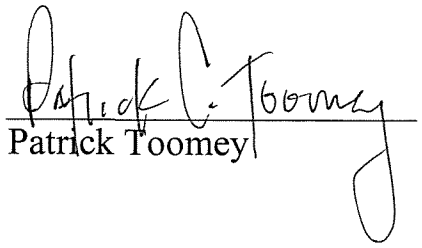
By email and UPS delivery

Laura Donohue
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, DC 20001
ldk@georgetown.edu

By email and UPS delivery

Caitlin Vogus
Reporters Committee for Freedom of the Press
1156 15th St. N.W.

Suite 1250
Washington, DC 20005
cvogus@rcfp.org



Patrick Toomey